

*a***KERAJAAN NEGERI KEDAH****v.****SOBRI SALLEH***b*

HIGH COURT MALAYA, ALOR SETAR

KN SEGARA J

[CIVIL APPEAL NO: 12-15-94]

18 SEPTEMBER 1997

*c****ROAD TRAFFIC: Evidence - Police witness - Corroboration by investigating officer - Whether good corroboration****d*

The plaintiff had claimed damages for loss, pain and suffering for injuries sustained in an accident which is alleged to have arisen as a result of a hump of earth placed on the road by the defendant's servant and/or agent and/or authorised contractor whilst mending the road.

*e***Held:***f*

[1] Although the plaintiff mentioned about the unidentified car in his police report, the earth works and the hole, which were allegedly the vital contributions to the accident, were not mentioned in the police report at all.

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[2] The evidence of the alleged earth hump was said to be corroborated by the investigating officer, who clearly stated that road repair works were going on more than 40 meters away from the place of accident and she neither saw the road works nor did she investigate the purported hump as, at that time, there was no hump. She therefore afforded no corroboration whatsoever to the testimony of the plaintiff.

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[3] The learned Sessions Court judge had come to the conclusion that there was a breach of duty by the defendant but such finding is clearly not proven nor supported by the evidence before the court and it clearly cannot stand.

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[4] The effective cause of the accident was the unidentified car which cut across the path of the plaintiff suddenly after it shot out from the bend on the plaintiff's left, and thereafter, due to the plaintiff's inability to control his motorcycle, the motorcycle came to rest off the metal road

near the concrete pre-cast beam lying also off the road. Therefore, the defendant cannot be held liable at all for the plaintiff's misadventure and misfortune.

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[Appeal allowed with cost.]

Legislation referred to:

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Government Proceedings Act 1956, s. 7(3)

For the appellant - Jamal Mohamed FC

For the respondent - Nimal De Silva; M/s Brijnandan Singh Bhar & Co

Reported by Yow Ting Fong

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JUDGMENT

KN Segara J:

This is an appeal by the Kerajaan Negeri Kedah against the decision of the Sessions Court judge delivered on 15 May 1994.

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The plaintiff, one Sobri bin Salleh, had claimed damages for loss, pain and suffering for injuries sustained in an accident which occurred on 26 August 1982 at about 4.30pm along Jalan Alor Mengkudu near Simpang Kuala. The accident is alleged to have arisen as a result of a hump of earth placed on the road proper by the defendant's servants and/or agent and/or its authorised contractor whilst mending the road.

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The statement of claim filed by the plaintiff is quite clear in its allegations against the defendant. Paragraph 3 of the statement of claim states:

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.... the Plaintiff was riding his motorcycle ... when he was involved in a collision caused by the hump of earth placed on the road proper by the Defendant's servant and/or Agent and/or their authorised contractor and/or authorised construction servant and/or Agents while mending the road and leaving such works without any warning whatsoever to traffic using the road. (Page 9 Rekod Rayuan)

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The defendant has in its defence denied the collision was caused by the hump of earth and states that it was caused by an unidentified vehicle crossing the path of the plaintiff (see paras. 2 and 3 of the defence – p. 14 of Rekod Rayuan). It is, therefore, clear that the defence is not a bare denial as submitted by the plaintiff's counsel, but there is a clear traverse by the defence.

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a The plaintiff, in making the “Kerajaan Negeri Kedah” as the defendant, has clearly brought this action for damages under s. 7(3) of the Government Proceedings Act 1956. The plaintiff’s complaint is that the defendant, by its servant or agent (contractual or otherwise), has failed to warn the traffic of the road works and the inherent dangers. This squarely places the plaintiff’s claim under s. 7(3) of the Government Proceedings Act 1956 and for the plaintiff’s counsel to submit otherwise leaves the court to ponder under which head of law the plaintiff has founded his action. For ease of reference, s. 7(3) of the Government Proceedings Act 1956 is reproduced below:

c 7. (1)
(2)

d (3) Nothing in this section shall prevent the bringing of any suit for damages or compensation arising out of negligence or trespass in the execution of any works of construction or maintenance undertaken by the Government in the exercise of the said public duties.

(4)

e The plaintiff, PW2, gave evidence that he was riding motorcycle PK 7092 on the said road from Jalan Alor Mengkudu in the direction of Simpang Kuala at a speed of 40km, per hour. After a sharp bend, he knocked into an earth hump. There was no warning of the hump of earth across the road. In his police report, at p. 57 of the Rekod Rayuan, he said:

f ... apabila sampai disatu selekoh dekat dengan ban sebuah m/kar keluar daripada ban, No. tak ingat oleh sebab saya hendak mengelak dari m/kar itu, sebab tanah tinggi dan terjatuh dan terus terkena pada rasok titi jambatan, dan saya tak sedarkan diri

g The police report was made on 13 October 1982, some 7 1/2 weeks after the accident. In his evidence-in-chief, he says he is not sure when he first saw the alleged earth hump.

Saya tidak pasti jarak pertama kali lihat, lebih kurang 15 kaki. Saya tidak boleh elak sebab terlalu dekat.

h He goes on to explain that there was a motorcar which crossed from the left of the road to the right but it had nothing to do with the accident. Although he has mentioned about this car in his police report, nevertheless, the earth works and the “lubang”, which were allegedly the vital contribution to the accident, are not mentioned in the police report at all.

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Under cross-examination, PW2 says the first time he saw the motorcar was only after he negotiated the bend. The hole (“lubang”) was after the motorcar. He thinks the motorcar was 12 feet away from him when he first saw it. The bund was on PW2’s left and the place that was dug was at the same place as the bund. PW2 admitted he was riding very fast, at 40km per hour. The evidence of the alleged earth hump is said to be corroborated by PW1, the investigating officer, who clearly states that road repair works were going on more than 40 meters away from the place of the accident (p. 32 Rekod Rayuan):

... tempat memperbaiki jalan agak jauh dengan tempat kejadian iaitu 40 meter, daripada B’ ke arah Alor Mengkudu. Tempat kejadian ada jalan dikorek dengan tanah, tinggi saya tak ukur.

Tanah yang dimaksudkan lebih daripada 40 meter dengan tempat kejadian maka saya tidak lukis dalam plan. (emphasis added)

At p. 33 Rekod Rayuan, PW1 says the road was dug and she was not sure how big the hole was, as it was more than 40 metres away.

... Bahagian jalan tar yang dikorek. Saya tak pasti berapa besar lubang yang dikorek sebab ia melebihi 40 meter daripada tempat kemalangan, **saya tidak lihat lubang itu.** Lubang itu dikorek secara melintasi jalan. **Kenderaan boleh melalui jalan itu, ia ditimbus balik dengan tanah. Pada masa itu tiada lubang.** Saya tak pasti cara bagaimana ditimbus sebab tidak pergi lihat. Siapa yangbaiki jalan saya tidak siasat. (emphasis added)

The investigating officer neither saw the road works nor did she investigate the purported hump as, at that time, there was no hump. She received information about the accident on 26 August 1982 at about 8.30pm and arrived at the scene at about 8.55pm. Upon being questioned by the court, the investigating officer said at p. 33 Rekod Rayuan:

Masa saya sampai kedudukan seperti rajah kasar. ... Masa saya ketempat kejadian saya tidak melalui kawasan yang dikorek itu.

Now, can this witness corroborate something she never saw? Her testimony as to the state of the road is totally unacceptable. This witness affords no corroboration whatsoever to the testimony of the plaintiff, PW2. The investigating officer was in no position to testify as to whether the hump was there at the time of the accident at all!

The plaintiff had very categorically pleaded in his statement of claim, at para. 3, that the collision was caused by “the hump of earth placed on the road proper by the defendant’s servant and/or agent and/or their authorised contractor and/or authorised construction servant and/or agents ...

- a* It is, therefore, the duty of the plaintiff to prove the allegation, that is, the hump of earth was indeed placed by the defendant's servant and/or agents. PW1 had not investigated this fact – she could not testify there was indeed a hump at the scene of the accident. PW2, the plaintiff, says that there was a hump of earth but there is no other evidence to corroborate this. It
- b* does not *ipso facto* follow that the burden of disproving this purported hump on the road shifts to the defendant. Unless and until the fact is proved by the plaintiff, on a balance of probabilities, the burden does not shift. It was vital for the plaintiff to have called independent witnesses to establish that there was indeed road works carried out on the said stretch
- c* of the road by the servant or agents of the defendant or its authorised contractors. There is not an iota of evidence of this.

- The learned Sessions Court Judge had come to the conclusion that there was a breach of duty by the defendant but, such finding is clearly not proven or supported by the evidence before the court and, such finding
- d* clearly cannot stand. The learned Sessions Court Judge has failed to evaluate the evidence before him carefully and make a proper finding of fact as to whether there was:

- i) indeed, a hump on the road;
- e* ii) that the hump was created by the servant or agent of the defendant; and
- iii) that the hump was the effective and primary cause of the accident.

- If the learned Sessions Court judge had applied his mind carefully to the totality of the evidence, scrutinised the testimony of PW1 and PW2 and then given due consideration to the silent evidence, namely, the sketch plan, he would have most certainly come to the conclusion that the effective cause of the accident was the unidentified car which cut across the path of the plaintiff suddenly after it shot out from the bund ("ban") on the
- f* plaintiff's left side, and thereafter, due to the plaintiff's inability to control his motorcycle after attempting to avoid the said car, the plaintiffs motorcycle came to rest at about the place as shown in the sketch plan, ie, off the metal road near the concrete pre-cast beam (simen rasok jambatan) lying also off the road (about 1 metre from the right edge of
- g* the road).
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- There is no dispute that the plaintiff was an "L" licence holder. He was not a fully competent rider. He was riding his motorcycle fast, at a speed of 40km per hour, and after a sharp bend he was confronted with a

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motorcar cutting across his path, just 12 feet ahead of him. He tried to avoid it, and in doing so, obviously lost control of the motorcycle.

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In the above circumstances the defendant cannot be held liable, at all, for the plaintiffs misadventure and misfortune. The appeal is allowed with cost here and at the trial court.

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